

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 2007 Session

STATE OF TENNESSEE v. ROGER TODD

**Direct Appeal from the Circuit Court for Cannon County
No. F-04-01-B J.S. Daniel, Senior Judge**

No. M2006-01940-CCA-R3-CD - Filed May 31, 2007

The Defendant, Roger Todd, appeals from a trial court order denying funding for his psychological expert. After a thorough review of the record and applicable law, we conclude that Tennessee Rule of Appellate Procedure 3(b) does not provide a proper mechanism by which this Court may address an appeal of an order denying expert funding. Accordingly, the Defendant's appeal is dismissed.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Paul J. Bruno, Nashville, Tennessee, for the Appellant, Roger Todd.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; William C. Whitesell, District Attorney General; David Puckett, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

The facts making up the basis for this appeal are as follows: the Defendant was indicted for felony murder, first-degree murder, especially aggravated robbery, especially aggravated kidnaping, and setting fire to personal property. The State initially sought the death penalty for the first-degree murder charge, but the Defendant ultimately pled guilty and received a sentence of life without parole.¹

In preparation for his defense, the Defendant asked for and received permission to hire Dr.

¹The judgment form or forms were not included in the record. Therefore, we do not know precisely to what the Defendant pled guilty or when these guilty pleas occurred.

William Kenner to examine him in furtherance of his defense. Initially, in February, 2004, the Defendant, pursuant to Tennessee Supreme Court Rule 13, requested \$25,000 for Dr. Kenner. The trial court granted \$12,500 of that request.

On January 14, 2005, the Defendant filed a motion with the trial court requesting additional funds. Specifically, the Defendant requested \$38,559.50 — \$26,059.50 for services rendered over and above the \$12,500 initially granted in February, 2004, and \$12,500 for services not yet rendered but anticipated. On February 4, 2005, the trial court granted \$7500 of the \$12,500 request, but on April 26, 2005, the trial court denied the request for \$26,059.50. The trial court denied these funds because they were incurred without prior authorization, and to allow this type of practice would not be in conformance with Tennessee Supreme Court Rule 13, and it would render meaningless the “gatekeeper” role of the trial court in this situation.

On January 27, 2006, the Defendant requested \$27,122, the outstanding balance owed to Dr. Kenner for work that he performed but for which he was not ultimately paid. This request was denied on August 10, 2006. The Defendant appeals from this ruling.

II. Analysis

We begin our analysis by addressing whether the Defendant has an appeal as of right to this Court. Tennessee Code Annotated section 16-5-108(a)(1) gives this Court appellate jurisdiction over final judgments in criminal matters, and “and other cases or proceedings instituted with reference to or arising out of a criminal case.” However, having subject matter jurisdiction does not necessarily mean that a party has availed himself of a proper avenue of appeal. See State v. Phillips, 986 S.W.2d 874, 877 (Tenn. Crim. App. 1996) (“We must note, though, that the fact that we have authority over this case and the constitutional issue raised does not necessarily mean that the defendant has properly appealed the case.”).

The standard avenues of appeal are contained in Tennessee Rules of Appellate Procedure 3, 9, and 10. Rules 9 and 10 apply to interlocutory appeals and are thus not applicable to the present case. Rule 3(b) gives the right to appeal from a judgment of conviction in the following situations:

- (1) on a plea of not guilty;
- (2) on a plea of guilty or *nolo contendere*
 - (A) if the issue was reserved as a matter of law;
 - (B) if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence; or
 - (C) if the issues presented for review were not waived as a matter of law by the plea of guilty or *nolo contendere* and if such issues are apparent from the record;

Additionally, an appeal as of right may be taken from “an order denying or revoking probation,” or “a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.”

Tenn. R. App. P. 3(b).

It is clear that this is not an order denying or revoking probation, or a final judgment in a criminal contempt, habeas corpus, extradition or post-conviction proceeding. Further, we conclude that the Defendant in this case is not appealing from a “judgment of conviction” so he, therefore, has no proper avenue of appeal under Rule 3(b). The judgement of conviction was not included in the record, and the Defendant has not appealed any other issue. Additionally, the Defendant’s Notice of Appeal states that “the Defendant . . . appeals to the Tennessee Court of Criminal Appeals the Order of the Court filed on August 14, 2006 related to the Defendant’s Ex Parte Motion to Approve the Invoice of Psychiatrist William D. Kenner, M.D. for Work Performed on the Case by Dr. Kenner.”

Review of a denial of funds for expert services may be obtained via Rules 9 and 10, see State v. Georgia Lucinda Hagerty, No. E2001-01254-CCA-R10-CD, 2002 WL 202858, at *2 (Tenn. Crim. App., at Knoxville, Apr. 23, 2002), or when appealed as part of an appeal from a judgment of conviction. See Tenn. R. App. P. 3(b).² However, Rule 3 does not provide a mechanism by which we may address an order denying expert funding that is not part of an appeal from a judgment of conviction.³ This case is therefore not properly before this Court, and it is accordingly dismissed.

III. Conclusion

_____ In accordance with the foregoing reasoning and authorities, we dismiss the appeal.

ROBERT W. WEDEMEYER, JUDGE

²While this issue could have been appealed directly to the Supreme Court under previous editions of Rule 13, the current version does not allow for such review. Compare Tenn. Sup. Ct. R. 13, § 6(b) (2006), with Tenn. Sup. Ct. R. 13, § 6(b) (2004).

³When this appeal first came to this Court, the State filed a motion to dismiss the appeal pursuant to Tennessee Court of Criminal Appeals Rule 20. In the order denying the motion to dispose of the case via Rule 20, we mentioned that State v. Huskey, 688 S.W.2d 417 (Tenn. 1985), may be relevant to the issues presented herein. In Huskey, the Tennessee Supreme Court addressed a situation where an aggrieved attorney filed for a declaratory judgment claiming that the amount of payment he was to receive for his service as appointed counsel to an indigent defendant was so unreasonably low that it amounted to a constitutional taking. Id. at 418. After determining that claims of this nature must be made in the county where the case originated, the Supreme Court stated:

A party dissatisfied with a trial court order awarding compens[a]tion may appeal as of right in accord with the provisions of Tennessee Rules of Appellate Procedure applicable to such appeals. The notice of appeal required by Rule 3 shall be filed with the trial court within thirty days after the entry of the order in the trial court adjudicating the claim for compensation.

Id. at 419. Because the statement in Huskey refers this Court to the Tennessee Rules of Appellate Procedure, we conclude that Huskey does not provide for or create any additional avenue of appeal in and of itself.

